CCI Technology Sdn Bhd v Celcom Mobile Sdn Bhd and another suit

HIGH COURT (KUALA LUMPUR) — SUIT NOS 22NCC-902–06 OF 2012 AND D-22–192 OF 2009
MARY LIM J
24 FEBRUARY 2016

Contract — Breach — Action for damages — Defendant agreed to supply telephone lines to plaintiff to be used in its payphone booths — Plaintiff brought action against defendant and claimed for damages for breach of contract — Defendant counterclaimed for unpaid charges — Whether there was written instruction from plaintiff for activation of 1730 lines — Whether parties breached terms of agreement — Whether proper and reasonable for defendant to bar activated lines — Whether defendant's counterclaim proven

Evidence — Adverse Inference — Evidence Act 1950, s 114(g) — Defendant agreed to supply telephone lines to plaintiff to be used in its payphone booths — Plaintiff brought action against defendant and claimed for damages for breach of contract — Defendant counterclaimed for unpaid charges — Plaintiff's director, PW1 failed to turn up for cross-examination — Whether absence of PW1 had negative effect on plaintiff's case — Whether PW1 critical witness — Whether adverse inference should be invoked

The plaintiff and the defendant had agreed vide a service agreement and a letter of proposal from the defendant that the defendant would supply telephone lines to the plaintiff to be used in its payphone booth. It was agreed that rebates would be given to the plaintiff after the security deposit or bank guarantee was given, nevertheless, the security was not given until just a few days before the parties met on 15 January 2008 ('the meeting'). At the meeting, the defendant required the plaintiff to make two payments on the outstanding charges before rebates would be given, but again, the plaintiff failed to do the same. Consequently, the defendant barred the lines. The plaintiff's case was that the defendant was in breach of contract by barring the lines and terminating the agreement. In response, the defendant submitted that it was entitled to do so as the plaintiff was in breach. The plaintiff was in substantial arrears and the plaintiff had already been forewarned of such impending action if the arrears were not settled. The defendant furt her counterclaimed for the outstanding charges arising from the telephone lines. The plaintiff accepted that 8,022 lines were activated but disputed that another 1,730 lines as alleged by the defendant was also activated. The plaintiff submitted that it was only liable for these 1,730 lines if the defendant could show evidence of written instructions to activate.

A On the other hand, the defendant submitted that out of 1,730 lines, 1,400 lines were instructed via letter dated 28 August 2007 and email of that even date whereas the balance of 332 lines were advised activation by the plaintiff orally.

B **Held**, dismissing the plaintiff's claim and allowing the defendant's counterclaim with costs of RM80,000 subject to allocator:

(1) The intention of the parties was that the lines were not to be activated until and unless instructed by the plaintiff. The parties had agreed that C the instructions had to be written but had not specified the format, if any such written instructions were to assume. The parties being in good cordial relationship did not require any specific format, so long as there were instructions from the plaintiff. Thus, the email sent undeniably from the plaintiff's office met the requirements of the agreement. It was D certainly written and it was an instruction from the plaintiff. In addition, the email contained clear terms to the defendant and it was to activate the lines (see paras 15 & 17).

(2) With regards to the remaining 332 lines, the departure from the agreed E written form did not have any impact on the truth of the matter. There were no protests from the plaintiff upon receipt of statement for any of these lines at the material time, thus the plaintiff must be taken to have accepted that the departure was of no consequence to the dealings between the parties. In conclusion, a total of 1,730 lines were indeed F activated by the plaintiff and for which payment was due (see paras 18 & 22).

(3) The plaintiff's director, Mr Azizi was a critical witness for the plaintiff as he was the person who was in charge in every sense of word insofar as the contract with the defendant was concerned, thus, his absence in court G had a negative effect on the plaintiff's case. His absence must also have been due to the fact that he had evidence which would be detrimental to the plaintiff's case had he testified. Based on this, the court invoked the adverse presumption under s 114(g) of the Evidence Act 1950 (see para 21).

H

(4) The plaintiff did not pay the amount as agreed in the meeting and it did not pay it in time, hence the plaintiff could not insist on the defendant adhering to the terms as agreed at the meeting when it itself was in violation of those terms. Further, since the plaintiff did not make the I promised payments and did not pay on time, it was both proper and reasonable for the defendant to bar the activated lines (see paras 29, 31 & 34).

(5) The defendant's witness, DW1 had satisfactorily explained the calculations of the sum claimed by the defendant. In any event, as far

back as the meeting in January 2008, the plaintiff was fully aware that it was already in arrears as far as these services were concerned. The plaintiff being at fault could not avoid its liability. Based on the evidence, the defendant had proved its case on a balance of probabilities and thus the defendant was entitled to its counterclaim (see paras 35 & 37–39).

[Bahasa Malaysia summary

Plaintif dan defendan telah bersetuju melalui suatu perjanjian perkhidmatan dan suatu surat tawaran daripada defendan bahawa defendan akan membekalkan talian telefon kepada plaintif untuk digunakan dalam pondok telefon berbayar plaintif. Ia juga dipersetujui bahawa rebat akan diberikan kepada plaintif setelah deposit cagaran atau jaminan bank diberikan, namun begitu, cagaran tidak diberikan sehinggalah beberapa hari sahaja sebelum pihak-pihak berjumpa pada 15 Januari 2008 ('mesyuarat'). Pada mesyuarat tersebut, pihak defendan menghendaki pihak plaintif membuat dua pembayaran pada kadar tertunggak sebelum rebat diberikan, tetapi sekali lagi, plaintif gagal membuat perkara yang sama. Akibatnya, pihak defendan telah menyekat talian itu. Kes plaintif adalah bahawa defendan telah melanggar kontrak apabila menyekat talian dan menamatkan perjanjian. Sebagai balasan, defendan menghujahkan bahawa ia berhak berbuat demikian kerana plaintif telah melanggar perjanjian. Plaintif telah mempunyai tunggakan yang banyak dan plaintif telahpun diberi amaran terlebih dahulu tentang tindakan yang akan diambil sekiranya tunggakan tidak diselesaikan. Defendan selanjutnya membuat tuntutan balas untuk caj tertunggak berbangkit daripada talian telefon. Plaintif menerima bahawa talian 8,022 telah diaktifkan tetapi menafikan bahawa 1,730 talian lagi sebagaimana yang dinyatakan oleh defendan telah diaktifkan. Plaintif menghujahkan bahawa ia hanya bertanggungan bagi 1,730 talian ini jika defendan dapat menunjukkan keterangan dalam bentuk arahan bertulis untuk mengaktifkannya. Sebaliknya, defendan menghujahkan bahawa daripada 1,730 talian, 1,400 talian telah diberi arahan melalui surat bertarikh 28 Ogos 2007 dan e-mel pada tarikh yang sama manakala baki 332 talian telah diarahkan untuk diaktifkan oleh plaintif secara lisan.

Diputuskan, menolak tuntutan plaintif dan membenarkan tuntutan balas defendan dengan kos sebanyak RM80,000 tertakluk kepada alokatur:

(1) Niat pihak-pihak ialah supaya talian itu tidak diaktifkan sehinggalah dan jika diarahkan oleh plaintif. Pihak-pihak telah bersetuju bahawa arahan hendaklah diberikan secara bertulis tetapi tidak dinyatakan formatnya, sekiranya apa-apa arahan bertulis itu akan dibuat andaian. Pihak-pihak yang berada dalam hubungan yang baik tidak menghendaki apa-apa format yang spesifik, asalkan terdapat arahan daripada plaintif. Oleh itu,

e-mel yang dihantar yang tidak dinafikan daripada pejabat plaintif telah memenuhi kehendak perjanjian. Ia sudah pasti ditulis dan ia merupakan arahan daripada plaintif. Sebagai tambahan, e-mel itu mengandungi arahan yang jelas kepada defendan untuk mengaktifkan talian (lihat perenggan 15 & 17).

(2) Berkenaan dengan baki 332 talian, kegagalan untuk memberi arahan bertulis sebagaimana yang dipersetujukan tidak mempunyai kesan kepada kebenaran perkara itu. Tidak terdapat bantahan daripada plaintif apabila ia menerima penyata tentang mana-mana talian ini pada masa yang material, maka plaintif hendaklah dikira telah menerima bahawa kegagalan itu tidak memberi kesan kepada urusan antara pihak-pihak. Ringkasnya, sejumlah 1,730 talian memang telah diaktifkan oleh plaintif dan untuk itu pembayaran kena dibayar (lihat perenggan 18 & 22).

(3) Pengarah plaintif, Encik Azizi merupakan saksi penting bagi plaintif memandangkan beliau merupakan orang yang diberi kuasa dalam apa jua bentuk perkataan setakat mana kontrak dengan defendan adalah berkenaan, maka, ketidakhadirannya di mahkamah memberi kesan negatif terhadap kes plaintif. Ketidakhadirannya juga sudah pasti kerana beliau mempunyai keterangan yang memudaratkan kes plaintif sekiranya beliau memberi keterangan. Berdasarkan ini, mahkamah mengguna pakai anggapan yang menentang di bawah s 114(g) Akta Keterangan 1950 (lihat perenggan 21).

(4) Plaintif tidak membayar jumlah yang dipersetujukan dalam mesyuarat dan tidak membayar dalam masa yang dijanjikan, maka plaintif tidak boleh menuntut supaya defendan mengikut syarat sebagaimana yang dipersetujukan dalam mesyuarat apabila plaintif sendiri melanggar syarat itu. Selanjutnya, memandangkan plaintif tidak membayar bayaran yang dijanjikan dan tidak membayar dalam masa yang dijanjikan, maka adalah wajar dan munasabah untuk defendan menyekat talian itu (lihat perenggan 29, 31 & 34).

(5) Saksi defendan, DW1 telah memberikan penjelasan yang memuaskan tentang pengiraan jumlah yang dituntut oleh defendan. Dalam apa-apa keadaan pun, setakat mesyuarat pada Januari 2008, plaintif menyedari sepenuhnya bahawa ia sudahpun mempunyai tunggakan setakat mana perkhidmatan ini adalah berkenaan. Pihak plaintif tidak boleh mengelak daripada liabilitinya memandangkan ia bersalah. Berdasarkan keterangan, pihak defendan telah membuktikan kesnya atas imbangan kebarangkalian dan oleh itu defendan berhak untuk membuat tuntutan balas (lihat perenggan 35 & 37–39).]

Notes

For cases on action for damages, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3444–3451.

For cases on Evidence Act 1950, s 114(g), see 7(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 380–387.

Cases referred to

Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd [1987] 1 MLJ 302, SC (refd)

Legislation referred to

Evidence Act 1950 s 114(g)

Charanjit Singh Saini (CS Saini & Assoc) for the plaintiff.
Syahredzan Johan (RamRais & Partners) for the defendant.

Mary Lim J:

INTRODUCTION

[1] The plaintiff's claim is for, inter alia, damages for breach of contract whereas the defendant's counterclaim is for unpaid charges. There are eight bundles of documents filed of which only Bundle A comprises Part A type of documents. The remaining bundles from CBD1 to CBD7 comprise Part B type of documents.

FACTS OF THE CASE

[2] The plaintiff decided to install payphone booths throughout the country. It then entered into a service agreement around 15 November 2006 with the defendant which together with the letter of proposal from the defendant amounts to the underlying agreement between the parties.

[3] It is not in dispute that under these arrangements, the defendant would supply telephone lines to the plaintiff to be used in its payphone booths. Amongst the terms agreed between the parties as gathered from the proposal and the service agreement and as appearing in the statement of agreed facts are the following:

(a) all the telecommunication lines will be registered under the plaintiff's name;

(b) that the telecommunication lines will only be activated upon the plaintiff's written instructions and all bills and invoices will be issued on

A the activated lines;

(c) a commitment fee of RM80 will be imposed on each activated line;

(d) tenure of the contract is for 24 months from the date of the agreement and all lines must be activated within the 24 month period;

B

(e) each line shall have a credit limit usage of RM600;

(f) a penalty charge of RM150 will be imposed on each line terminated within the 24 month period;

C

(g) for each credit control action, a penalty charge of RM50 will be imposed; and

(h) the plaintiff is to pay a RM300,000 security deposit to the defendant.

D **[4]** Lines were activated and bills or monthly statements of accounts were issued. Sometime on 18 July 2007, the defendant agreed to grant some rebate to the plaintiff. According to DW1, the rebates would be given after the security deposit or bank guarantee was given because even by this time, the plaintiff had yet to provide the deposit.

E **[5]** The security was not given until just a few days before the parties met on 15 January 2008. At that meeting by which time the plaintiff had fell into arrears of over RM4m, the defendant required the plaintiff to make two payments on the outstanding charges before rebates would be given. Timelines were worked in. According to the defendant, these timelines and conditions

F precedent were not met. Consequently, with the bills or charges unpaid, the defendant barred the lines. By letter dated 29 April 2008, the plaintiff wrote to the defendant informing that it was terminating the lines 'sementara waktu semua talian'. According to PW3, this was to avoid the running charges which the plaintiff would have to pay despite the lines being barred.

G

[6] The plaintiff claimed that the defendant was in breach of contract by barring the lines and terminating the agreement. The defendant basically contended that it was entitled to do so as the plaintiff itself was in breach. The

H plaintiff was in substantial arrears and the plaintiff had already been forewarned of such impending action if the arrears were not settled. The defendant counterclaimed for the outstanding charges arising from a total of 9,790 telephone lines.

I **[7]** Eight issues were identified for determination. The defendant submitted on five large issues, taking the position that some of the issues are either no

longer relevant or may be properly taken to have been subsumed into the remaining issues. Having heard both oral submissions and having considered the written submissions, I agree that the issues may follow the broadly the submissions of the defendant.

DISPUTED LINES

[8] The first issue really concerns the number of lines activated. In this regard, I agree with the defendant that it is not so much whether 20,000 or 30,000 lines were activated. Following an audit exercise to reduce the details in dispute that was directed by the court before the trial started, the parties agree that the number of lines in dispute is now 1,730 lines. Initially, it was 1,732 lines but the plaintiff has now conceded that the number of lines disputed now stands at 1,730 lines. Both parties appointed accountants to go through all documents, bills, invoices, 'activation letters' for this purpose. The plaintiff now accepts that 8,022 lines were activated but disputes that another 1,730 lines as alleged by the defendant was also activated. The details of these 1,730 lines appear at pp 699–724 of CBD5.

[9] It is the plaintiff's case that it is only liable for these 1,730 lines if the defendant can show evidence of written instructions to activate. The plaintiff further maintained that the written instructions must take the same form or manner as can be found in CBD7. In that bundle, a sampling of such instructions was tendered. The written instructions take the form of a letter to the defendant, instructing the defendant to activate the following lines with the accompanying simcard details.

[10] Hj Mohamed Rasip bin Md Zain ('PW1') and Mohd Faisal Ettian bin Abdullah ('PW3') testified for the plaintiff on this. Both witnesses are directors and shareholders of the plaintiff. However, almost what PW1 told the court is hearsay as he did not attend meetings nor was he involved in the correspondence or exchanges with the defendant. That was very much left to Encik Mohd Azizi Alias, a director and shareholder of the plaintiff. Mr Mohd Azizi did not testify. His position is discussed later but for now, it would appear that the plaintiff has only the evidence of PW1 and PW3 to support and prove its case.

[11] In any event, it may be gathered from PW1's evidence that its complaint really is that the defendant's charges did not take into account several matters: security deposit, rebates, new package terms, the plaintiff's application for a reduction of payment on the charges. Because the defendant failed to reactivate the lines, the plaintiff was forced to cease operations. PW1 told the court that the plaintiff had suffered loss and damage from various contracts, and he cited the relevant contracts as evidence of that loss.

[12] PW3 gave reasons on why the plaintiff had not paid the defendant from June 2007. According to him, the plaintiff had financial problems and problems with vandalism of its payphone booths. The plaintiff was also awaiting implementation of the new package terms. The plaintiff then approached the defendant to resolve its problems. PW3 attended the meeting of 15 January 2008 with Mohd Azizi. PW3 testified that the defendant agreed to restructure the outstanding payments. Despite the plaintiff paying the security deposit and the sum of RM398,219.60, the defendant barred the activated lines and did not reactivate the lines after receiving payment.

[13] It is the defendant's case that out of the 1,730 lines, 1,400 lines were instructed via letter dated 28 August 2007 and email of that even date — see pp 668–669 of CBD5. The defendant accepts that the balance of 332 lines were advised activation by the plaintiff orally. DW1 testified that someone from the plaintiff's office including one Azizi, the main person behind all the arrangements between the parties would call the defendant for this purpose. The defendant followed this up by opening the documents seen at CBD8.

[14] The plaintiff countered that the agreement between the parties was that the instructions had to be written and nothing else. Even then, the instructions had to follow the format found in CBD7, that is, by letter from the plaintiff.

[15] With respect, I disagree. The intention of the parties is that the lines were not to be activated until and unless instructed by the plaintiff. The parties had agreed that the instructions had to be written. The parties have however, not specified the format, if any such written instructions are to assume. In my view, the parties being in good cordial relationship did not require any specific format, so long as there were instructions from the plaintiff. Here, I accept that the email sent undeniably from the plaintiff's office meets the requirements of the agreement. It is certainly written and it is an instruction from the plaintiff.

[16] The plaintiff through PW3, who did not write the email, claims that the instruction was only about the renewed sim cards; and not a letter to activate the lines. Hence, the email should be disregarded.

[17] I disagree. The email contains clear terms to the defendant and that it is to activate the lines. This intention can also be gathered from the subject matter of the email: 'Activation for 3G Celcom Simcard'. The writer from the plaintiff's company requested the defendant to 'aktifkan simkad 3G seperti yang telah saya lampirkan no simkad dan no. telefon' as well as for the 1,400 lines set out. I cannot see any difference in any material respect between this email and the earlier letters sent by the plaintiff to activate the 8,000 over lines. Those letters are found in CBD7. I am convinced that these 1,400 lines have been properly activated by the defendant at the plaintiff's behest.

[18] As for the remaining 332 lines, I do not see the departure from the agreed written form to have any impact on the truth of the matter. There were no protests from the plaintiff, again upon receipt of statement for any of these lines at the material time. Instead, the plaintiff must be taken to have accepted that this departure is of no consequence to the dealings between the parties.

[19] I must add that I do not find the plaintiff's letter of 9 October 2007 requesting the defendant to check '20 unknown phone numbers' as amounting to a protest on the matter of activation of the lines — see p 744 CBD7. This letter means what it says; it is a request to the defendant to check on these 20 phone numbers which the plaintiff could not trace in its listing. This is a far cry from it representing a protest to the activation of the 20 lines. The subsequent sentence confirms this:

> We would appreciate it if you could trace and inform us well in time whether the entire phone number which we are mention is in your services or not ...

[20] I am inclined to accept DW1's evidence as opposed to PW1 and PW3 who have no personal knowledge of the detailed matters presently under contention. The plaintiff's affairs and decisions were almost single-handedly done by one Encik Mohd Azizi Alias, a director and shareholder of the plaintiff. Mr Azizi was initially called to testify but he subsequently failed to turn up for cross-examination without any explanation. His evidence was then expunged given that he was not available for cross-examination.

[21] Mr Azizi was a critical witness for the plaintiff as he was the person who was in charge in every sense of the word insofar as this contract with the defendant is concerned. DW1 said that Azizi activated the lines verbally. While DW1 was available to be cross-examined and he was cross-examined on this, Azizi was not. I am of the opinion that Azizi's absence and the failure to take even more positive steps to ensure his presence in court to assist in the case has a negative effect on the plaintiff's case. His absence must also have been due to the fact that he has evidence which would be detrimental to the plaintiff's case had he testified. This is indeed a suitable case for the invocation of the adverse presumption under s 114(g) of the Evidence Act 1950; and I so invoke. Mr Azizi's evidence would have confirmed DW1's evidence that there were indeed oral instructions to activate the lines presently in dispute. Hence, his failure to attend court.

[22] As a result, it is my conclusion that a total of 1,730 lines were indeed activated by the plaintiff and for which payment is due.

REBATES

[23] On the matter of rebates, this evolved only part way through the contract, sometime on 18 July 2007. The defendant's letter setting out the terms can be found in its letter at p 21 of CBD5.

[24] It is evident from the contents of this letter that the offer for rebates was subject to terms:

> Walaubagaimana pun, rebet akan dimulakan selepas menerima arahan Jaminan Bank (Bank Guarantee) daripada CCI Technology seperti mengikut perjanjian awal.

[25] The plaintiff did not provide the BG till January 2008, four days before the meeting of 11 January 2008. PW3 and DW1 were at that meeting, the minutes of which can be found at pp 673–675 of CBD5. PW3 testified that he attended the meeting, that the minutes were not accurate as it did not record the plaintiff's concerns and objections. However, he did not inform the defendant in any manner whatsoever and certainly not at any time after receiving the minutes.

[26] Had this not been the case, and with the activation of the 1,400 lines between August 2007 and the barring of the lines in February 2008, it would be fair and reasonable to expect protests and objections from the plaintiff each time the bills or statements were presented for payment from the plaintiff. Instead, there were none.

[27] Under those circumstances, I must accept the minutes to be accurate depictions or records of what transpired at the meeting of 15 January 2008. Amongst others, the minutes record that as at January 2008, the plaintiff was in arrears on the charges to the tune of RM4,827,070.91. Although there were discrepancies between the parties over the amount used and amount paid, the parties did not appear unduly troubled. The parties were agreeable as to how they were going to treat the BG and take steps to verify some possible direct payment of RM5,159.03 to one of the defendant's branch office.

[28] The parties next discussed the 'restructuring' of the outstanding sum of RM3,251,434.82. The minutes record that the plaintiff was required to make two payments of RM100,000 and RM695,861.24 first before the rebates and restructuring would be done and the rebates could be enjoyed. These payments were to be paid by 21 February 2008 and 28 February 2008 respectively. DW1 testified to this effect.

[29] Although the plaintiff had paid the defendant a sum of RM398,219.60,

this payment was late. It was only paid on 7 March 2008 by which time the defendant had already barred the lines. It cannot be denied that the plaintiff did not pay the amount as agreed and it did not pay it in time. Under these conditions, I am of the view that the plaintiff cannot insist on the defendant adhering to the terms as agreed at the meeting when it itself is in violation of those terms.

[30] The plaintiff has also contended that the defendant was wrong in imposing these two additional conditions after the plaintiff had already provided the BG.

[31] With respect, I disagree. The minutes reflect quite clearly and consistent with the defendant's case that the meeting was to resolve the many outstanding issues between the parties. Despite these terms, there was no payment or compliance by the plaintiff. Under these circumstances, the defendant was entitled to suspend the lines which were in arrears. The defendant had given ample warning and I agree with the defendant that the plaintiff cannot complain.

BARRING OF LINES

[32] The above discussion and findings extends to the matter of barring of the lines. With the plaintiff in substantial arrears, and while there may have been no express clause to that effect, I believe the general contractual principles apply.

[33] When the plaintiff did not settle the account which was undeniably outstanding and in arrears, the defendant was entitled to bar the lines. The termination was by the plaintiff. The defendant had forewarned the defendant as to this course of action at that same meeting. It was open to the plaintiff to settle the outstanding sums to avoid this. If the arrears were settled or if the two payments were made, as indicated by the defendant, the lines would be reopened upon written requests from the plaintiff — see para 8 at p 675 of CBD5. The meeting concluded with the plaintiff promising that it would comply with the agreed arrangements.

[34] Since the plaintiff did not make the promised payments and did not pay on time, it was proper for the defendant to take the course of action that did. Under these circumstances, I am of the view that it was both proper and reasonable for the defendant to bar the activated lines.

COUNTERCLAIM

[35] The defendant has counterclaimed for the services rendered. DW1 has satisfactorily explained the calculations of the sum claimed. I do not find the existence of large bills or billings for the same sum anything untoward. The lines were VIP 4 lines where the credit limits of RM600 could be breached.

[36] DW1 has also explained that as at 24 February 2009, the outstanding charges comprised a sum of RM5,890,518.55 due under the payphone accounts and a sum of RM417,092.95 for the corporate lines, bringing a total of RM6,307,611.50 as the sum due to the defendant after deducting the RM300,000 which had been deposited on 11 January 2008.

[37] In any event, as far as back as the meeting in January 2008, the plaintiff was fully aware that it was already in arrears as far as these services are concerned. The plaintiff, being at fault cannot avoid its liability — see *Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302.

[38] Based on the evidence before me, I am satisfied that the defendant has proved its case on a balance of probabilities.

[39] The defendant is therefore entitled to its counterclaim with interest at the rate of 5%pa from the date of judgment to the date of realisation.

CONCLUSION

[40] For all these reasons, I am of the view that the plaintiff has failed to prove its case on a balance of probabilities. In any case, having examined the evidence of PW1, I do not find any evidence of any loss or damage proved.

[41] The existence of contracts including tenancy agreements are not sufficient evidence of any loss. Such liquidated claims must be strictly proved and there is a failure to discharge that burden. The plaintiff's claim is therefore dismissed.

[42] The plaintiff's claim is accordingly dismissed and the defendant's counterclaim is allowed with interest at the rate of 5%pa from the date of judgment to the date of realization. I further make a single order of costs of RM80,000. Both counsel have proposed a range of costs from RM80,000 to RM100,000 taking into account the various factors such as number and complexity of issues and length of trial. I agree that the sum of RM80,000 is reasonable and I order these costs to be paid to the defendant subject to payment of allocator.

Plaintiff's claim dismissed; defendant's counterclaim allowed with costs of RM80,000 subject to allocator.

Reported by Dzulqarnain Ab Fatar